TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922.

No. [redacted] 122

THE UNITED STATES, APPELLANT,

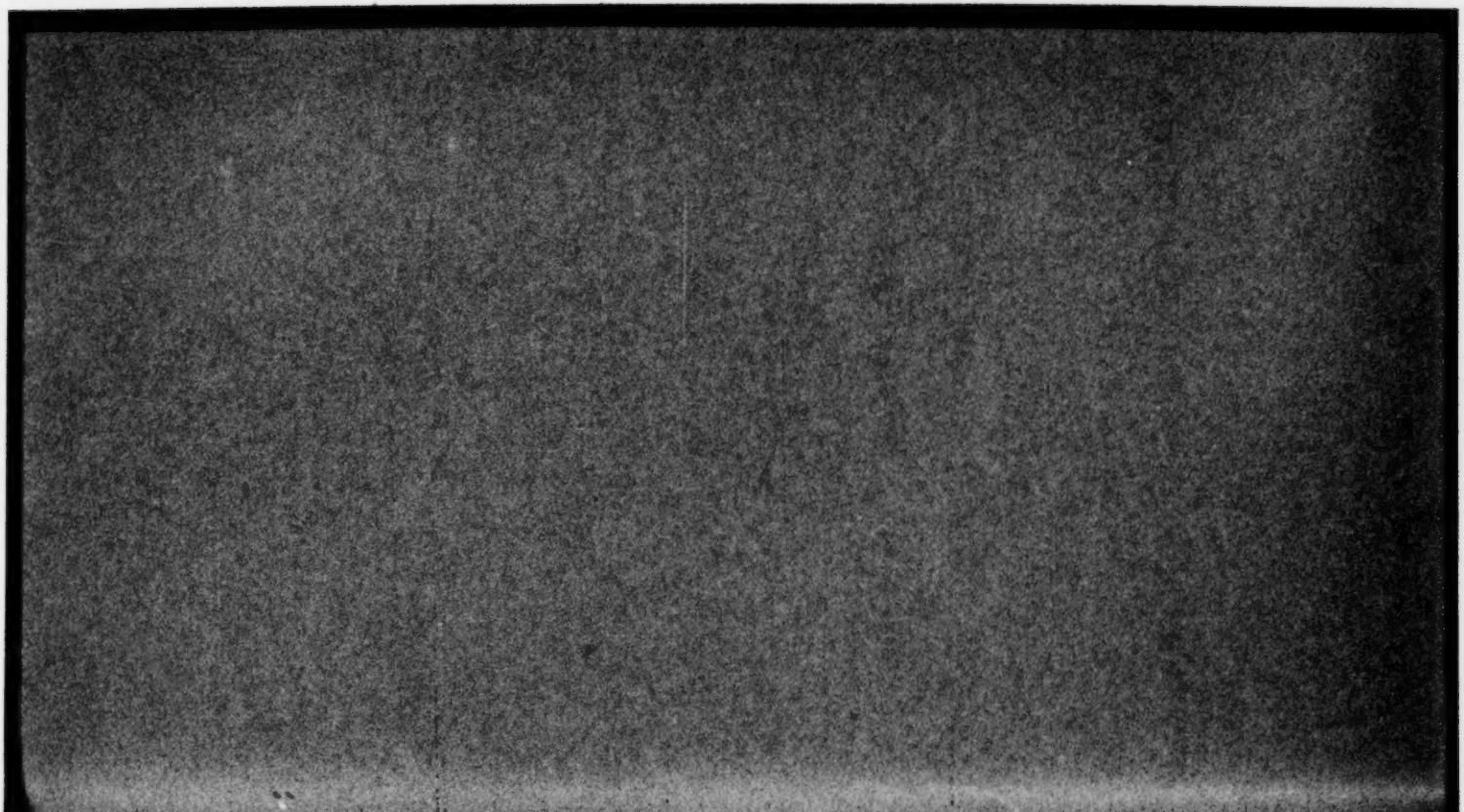
vs.

NORTHEASTERN CONSTRUCTION CO.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 31, 1922.

(28366)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 411.

THE UNITED STATES, APPELLANT,

vs.

NORTHEASTERN CONSTRUCTION CO.

APPEAL FROM THE COURT OF CLAIMS.

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1 *I. Petition and Exhibit "A."*

(Filed Nov. 28, 1919.)

In the Court of Claims.

NORTH-EASTERN CONSTRUCTION COMPANY
v.
THE UNITED STATES. } No. 34229.

PETITION.

To the honorable the Court of Claims:

The claimant, North-Eastern Construction Company, respectfully represents:

I. That it is a corporation organized under the laws of the State of New York with its principal office and place of business in the city of New York in said State.

II. On the 12th day of September, 1918, a contract was signed by it, represented by its president, D. A. Garber, and by the United States of America, represented by R. C. Marshall, jr., brigadier-general, U. S. Army, which contract became effective on its date, whereby the claimant agreed to furnish the necessary labor, material, and so forth, and do all things necessary for the construction and completion of certain barracks buildings at Astoria, Long Island, in the State of New York, on the basis of cost plus a fixed profit or fee for work done. A copy of said contract is hereto attached as Exhibit "A" and made a part thereof.

III. Said contract provided among other things, in Article II, as follows:

2 "Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

* * * * * * *

"(h) Such bonds, fire, public liability, employers' liability, workmen's compensation and other insurance as the contracting officer may approve or require and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the pur-

pose of reimbursement to the contractor but not for the purpose of determining the contractor's fee, except as hereinafter provided."

* * * * * * *

"(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph."

Said contract further provided in Article IX as follows:

"Bond.—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of fifteen thousand ($15,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

3 IV. On entering on the work claimant, through its representatives, procured the surety bond required by Article IX above quoted. Said bond was approved by the contracting officer or his representative.

V. The contractor thereafter paid the actual necessary cost of surety bond so given, amounting to one hundred and fifty dollars ($150.00), and presented a voucher covering such payment to the contracting officer for his approval and payment, and the said sum of one hundred and fifty dollars ($150.00) was upon the approval of the contracting officer duly reimbursed to the contractor. Such payment was made under the following provision of the contract, Article IV:

"Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay-rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments.

4 When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two

and one-half per cent (2½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

VI. The Comptroller of the Treasury later ruled that the form of contract used here and in all other cases of this character did not form a legal basis for the reimbursement to the contractor of cost of premiums on surety bonds. In accordance with this decision, on final settlement of moneys due under this contract the sum of one hundred and fifty dollars ($150.00) was deducted and withheld from moneys due this contractor as reimbursement to the United States of the sum previously paid to claimant for cost of premium on surety bond, as aforesaid. Such deduction was made in the accounts of Captain Nathaniel Dain, Q. M. C., for the month of June, 1919, Voucher No. 44, as follows:

"Premium on Indemnity Bond reimbursed to contractor by constructing quartermaster, which expenditure is not a proper charge against the Government as per ruling of Comptroller of Treasury—dated May 28, 1919.
Amount bond $15,000.00—$150.00."

Claimant refused to agree to said deduction and expressed dissent therefrom by placing thereon the following statement:

"We hereby certify that the above statement represents all outstanding obligations under this contract to the best of our knowledge and belief without admitting that the balance of fee as shown is final; also claim will be made for reimbursement to us of the premium of $150.00 on surety bond."

Claim was therefore presented to the Auditor for the War Department for reimbursement of the $150.00 so withheld and the claim disallowed. On appeal to the Comptroller of the Treasury, the action of the Auditor was affirmed.

VII. Claimant now represents that the bond given as above set forth was obtained with the approval of the contracting officer and by virtue of the contract provision requiring it to be given, and that said contractor made a net expenditure of one hundred and fifty dollars ($150.00) on account thereof, for which it has not been reimbursed.

VIII. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims one hundred and fifty dollars ($150.00).

KING & KING,
Attorneys for Claimant.

6 DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information, and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 28th day of November, 1919.

[SEAL.] MAY LOU H. BYINGTON,
Notary Public.

9 In the Court of Claims.

NORTH-EASTERN CONSTRUCTION COMPANY
v.
THE UNITED STATES. } No. 34,229.

EXHIBIT A.

War Department. Construction Division, U. S. A., 4th Ed.—10M 6-18.

Contract for emergency work. Construction of barracks buildings at Astoria, Long Island, New York.

Contract made and concluded this 12th day of September, 1918, by and between North-Eastern Construction Company, of New York, N. Y., a corporation organized under the laws of the State of New York represented by Daniel A. Garber, its president, party of the first part (hereinafter called contractor), and the United States of America, by Brigadier General R. C. Marshall, jr., U. S. A. (hereinafter called contracting officer), acting by authority of the Secretary of War, party of the second part.

Whereas, the Congress having declared by joint resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the
10 work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time; and

Whereas, it is advisable, under the disturbed conditions which exist in the contracting industry throughout the country, for the United States to depart from the usual procedure in the matter of letting contracts, and adopt means that will insure the most expeditious results; and

Whereas, the contractor has had experience in the execution of similar work, has an organization suitable for the performance of

such work, and is ready to undertake the same upon the terms and conditions herein provided;

And, whereas, it is not practicable to do the work hereinafter provided on or under any form of contract other than that which hereinafter follows, nor will circumstances permit the delay in letting this contract until at least three responsible competing contractors shall have been notified and considered in connection with such contract and the awarding of the contract to the lowest bidder.

Now, therefore, this contract witnesseth, that in consideration of the premises and of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the contracting officer as follows:

Article I.

Extent of the work.—The contractor shall, in the shortest possible time, furnish the labor, materials, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work: Barracks buildings at Astoria, Long Island, New York, in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.

The contracting officer may, from time to time, by written instructions or drawings issued to the contractor make changes
11 in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of instruction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the contracting officer, all machinery, equipment, hand tools, supplies, and materials, for which the contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the contractor from any duties imposed hereby or by the contracting officer.

Article II.

Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

(a) All labor, material, machinery, hand tools not owned by the workmen, supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be con-

strued to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the contracting officer.

(b) All sub-contracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as
12 pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

Rental to the contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work, the contractor shall file with the contracting officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the contracting officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the contracting officer shall be deemed final. When and if the total rental paid to the contractor for any such part shall equal the valuation thereof, no further rental therefor shall be paid to the contractor, and title thereto shall vest in the United States. At the completion of the work, the contracting officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the contractor and the contracting officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the contracting officer shall furnish or supply any such equipment, the contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be
13 used in connection with said work, subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor, and expediting the production and transportation of material and equipment.

(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the contractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(g) Buildings and equipment required for necessary field offices, commissary, and hospital and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(h) Such bonds, fire, public liability, employers' liability, workmen's compensation, and other insurance as the contracting officer may approve or require and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

(i) Permit fees, deposits, royalties, and other similar items
14 of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

(j) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer it shall be specifically certified as being allowed under this paragraph.

The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds and machinery, furnished under this contract, and certified by the contracting officer as being for installation or for consumption in the course of the work hereunder; the contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the contracting officer; but the contractor shall have no fee based on such expenditures. Freight charges paid by the contractor for transportation of construction equipment, construction plant, tools, and supplies of every character shall be treated as part of the cost of the work upon which the contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant, and tools over distances in excess

of five hundred miles shall require the special approval of the contracting officer.

No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

All revenue from the operations of the commissary, hospital or other facilities, or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work.

Article III.

Determination of fee.—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is $100,000 or under, a fee of 7% of such cost.

If the cost of the work is over $100,000 and under $125,000, a fee of $7,000.

If the cost of the work is over $125,000 and under $450,000 a fee of 6½%.

If the cost of the work is over $450,000 and under $500,000, a fee of $29,250.

If the cost of the work is over $500,000 and under $1,000,000, a fee of 6%.

If the cost of the work is over $1,000,000 and under $1,100,000, a fee of $60,000.

If the cost of the work is over $1,100,000 and under $1,500,000, a fee of 5½%.

If the cost of the work is over $1,500,000 and under $1,650,000, a fee of $82,500.

If the cost of the work is over $1,650,000 and under $2,200,000, a fee of 5%.

If the cost of the work is over $2,200,000 and under $2,450,000, a fee of $110,000.

If the cost of the work is over $2,450,000 and under $2,850,000, a fee of 4½%.

If the cost of the work is over $2,850,000 and under $3,250,000, a fee of $128,250.

If the cost of the work is over $3,250,000 and under $4,000,000, a fee of 4%.

16 If the cost of the work is over $4,000,000 and under $4,250,000, a fee of $160,000.

If the cost of the work is over $4,250,000 and under $4,775,000, a fee of 3¾%.

If the cost of the work is over $4,775,000 and under $5,175,000, a fee of $179,062.50.

If the cost of the work is over $5,175,000 and under $5,725,000, a fee of 3½%.

If the cost of the work is over $5,725,000 and under $6,225,000, a fee of $200,375.

If the cost of the work is over $6,225,000 and under $6,825,000, a fee of 3¼%.

If the cost of the work is over $6,825,000 and under $7,400,000, a fee of $221,812.50.

If the cost of the work is over $7,400,000 and under $7,750,000, a fee of 3%.

If the cost of the work is over $7,750,000 and under $8,350,000, a fee of $242,000.

If the cost of the work is over $8,350,000 and under $8,800,000, a fee of 2¾%.

If the cost of the work is over $8,800,000 and under $9,650,000, a fee of $242,000.

If the cost of the work is over $9,650,000 and under $10,000,000, a fee of 2½%.

If the cost of the work is over $10,000,000, a fee of $250,000.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (*b*) of Article II hereof, shall in each of the above contingencies be two and one-half per cent (2½%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

17 The total fee to the contractor hereunder shall in no event exceed the sum of nine thousand five hundred ($9,500.00) dollars, anything in this agreement to the contrary notwithstanding.

Article IV.

Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and includ-

ing the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two and one-half per cent (2½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals
for the purpose of enabling the contractor to take advantage
18 of discounts at intervals between the dates above mentioned or
for other lawful purposes. Upon final completion of said work the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

Article V.

Inspection and audit.—The contracting officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, to the work and material, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to said work; and the contractor shall preserve for a period of two years after its completion or cessation of work under this contract all the books, records, and other papers just mentioned. Any duly authorized representative of the contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the contractor shall be such as is satisfactory to the contracting officer.

If at any time the contracting officer shall find that bills for labor, material, or other bills legitimately incurred by the contractor hereunder are not promptly paid by the contractor, the contracting officer

may, in his discretion, refuse to make further payments to the contractor until all such obligations past due shall have been paid. Should the contractor neglect or refuse to pay such bills within five days after notice from the contracting officer so to do, then the contracting officer shall have the right to pay such bills directly, in which event such direct payment shall not be included in the cost of the work.

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Article VI.

Special requirements.—The contractor hereby agrees that it will:

(a) Begin the work herein specified at the earliest time practicable, and diligently proceed so that such work may be completed at the earliest possible date.

(b) Promptly pay for all labor, material, or other service rendered.

(c) Procure and thereafter maintain such insurance in such forms and in such amounts and for such periods of time as the contracting officer may approve or require.

(d) Procure all necessary permits and licenses, and obey and abide by all laws, regulations, ordinances, and other rules applying to such work, of the United States of America, of the State or Territory wherein such work is done, of any subdivision thereof, or of any duly constituted public authority.

(e) Unless this provision is waived by the contracting officer, insert in every contract made by it for the furnishing to it of services, materials, supplies, machinery, and equipment, or the use thereof, for the purposes of the work hereunder, a provision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the contracting officer thereunder.

(f) In every subcontract made in accordance with the provisions hereof, require the subcontractor to agree to comply fully with all the undertakings and obligations of the contractor herein, excepting such as do not apply to such subcontractor's work.

(g) At all times keep at the site of the work a duly appointed representative, who shall receive and execute on the part of the contractor such notices, directions, and instructions as the contracting officer may desire to give.

(h) At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the coning officer and the United States.

20

Article VII.

Right to terminate contract.—[Omitted from printing as irrelevant to the present case.]

Article VIII.

Abandonment of work by contracting officer.—[Omitted from printing as irrelevant to the present case.]

Article IX.

Bond.—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of fifteen thousand ($15,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor.

Article X.

Convict labor.—[Omitted from printing as irrelevant to the present case.]

Article XI.

Hours and conditions of labor.—[Omitted from printing as irrelevant to the present case.]

Article XII.

Right to transfer or sublet.—Neither this contract, nor any interest therein, shall be assigned or transferred. The contractor shall not enter into any subcontract for any part of the work herein specified without the consent and approval in writing of the contracting officer. In case of such assignment, transfer, or subletting without the consent and approval, in writing, of the contracting office, the contracting officer may refuse to carry out this contract either with the transferror or transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

21

Article XIII.

No participation in profits by Government officials.—[Omitted from printing as irrelevant to the present case.]

Article XIV.

Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider itself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of the Construction Division of the Army for determination. If, however, the contractor shall feel aggrieved by the decision of that officer, it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

Article XV.

This contract shall bind and inure to the contractor and its successors.

It is understood and agreed that wherever the words "Contracting officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War, and any duly appointed representative of the contracting officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

NORTH-EASTERN CONSTRUCTION CO.,
By D. A. GARBER, *President.*

Witnesses:
(1) JOHN J. MURPHY.
(2) C. A. MILLER.

22

UNITED STATES OF AMERICA.
By R. C. MARSHALL, Jr.,
Brigadier General, U. S. A.,
Contracting Officer.

Witnesses:
(1) M. J. SWAYZEE.
(2) G. C. MEYER.

Schedule of rental rates.

[Omitted from printing as irrelevant to the present case.]

23

II. History of proceedings.

On January 27, 1920, the defendant filed a demurrer to the plaintiff's petition.

On February 24, 1920, the demurrer was argued by John E. Hoover, Esq., for the defendant, and by George A. King, Esq., for plaintiff, and submitted.

On March 1, 1920, the demurrer was overruled by the court without prejudice.

III. Argument and submission of case.

On April 4, 1921, this case was argued and submitted by George A. King, Esq., for plaintiff, and by John E. Hoover, Esq., for defendant.

IV. Findings of fact and conclusion of law.

(Entered April 18, 1921.)

This case having been heard by the Court of Claims the Court, upon the evidence, makes the following

FINDINGS OF FACT.

I. The plaintiff, a corporation organized under the laws of the State of New York, entered into a contract in writing with the United States on September 12, 1918, for the construction of buildings and other facilities at Astoria, Long Island, New York. A copy of said contract is attached to the petition of the plaintiff as Exhibit A, and is made a part hereof by reference.

II. The plaintiff furnished a bond, satisfactory to the contracting officer, in the sum of $15,000. Said bond was given by the plaintiff with the National Surety Company of New York as surety.

III. Before this contract, or any other contract for construction for war purposes, was signed, negotiations were entered into between the War Department and the various surety companies, as to the
24 premium to be charged by surety companies on bonds, the Secretary of War having directed that such premiums should be treated as part of the cost of the work. As the result of these negotiations the surety companies agreed to charge a premium of one per cent upon the penalty of the bond, their premium theretofore having been two per cent on the amount of work involved.

In accordance with this arrangement the premium of the National Surety Company of New York for underwriting this bond was fixed at $150.00, one per cent of the penalty of the bond. The plaintiff paid the premium to the surety company. Subsequently the amount of said premium was paid to the plaintiff by the United States. Five hundred or more of such payments were made by the United States to contractors, who had cost plus contracts with the United States.

Upon making final payment under this contract June 24, 1919, the amount of the premium so paid was deducted from a balance otherwise due plaintiff and it has not been restored or repaid to it. The amount so paid was accepted under protest and with notice that claim would be made for reimbursement for the amount of said premium.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides as a conclusion of law that the plaintiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one hundred and fifty dollars ($150).

Campbell, Chief Justice, dissents.

(See case of Mason & Hanger, No. 34208, decided April 18, 1921.)

V. Judgment of the court.

At a Court of Claims held in the city of Washington on the 18th day of April, A. D. 1921, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the North-

eastern Construction Company, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of one hundred and fifty dollars ($150).

BY THE COURT.

25 *VI. Opinion of the court in the case of Mason & Hanger, No. 34208, referred to.*

OPINION.

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the sum of $12,064.52. This sum is made up of items which the plaintiff claims it is entitled to by reason of the fact that the items so claimed should have been paid by the defendants under the contract which is based upon the system of cost of construction plus a fee. The contract provides that the plaintiff shall be reimbursed for such of its actual net expenditures in the performance of the work as may be approved or ratified by the contracting officer. For its own services the plaintiff was to receive a fee based upon a sliding scale with a maximum limit.

There is no dispute as to the facts. The plaintiff made the expenditures, but the defendants contend that the bond for performance required by Article IX of the contract is not a bond within the discretion of the contracting officer to approve or require, and that the expenditure of $2,500, the premium on the bond, did not fall within the expenditures provided for in Article II of the contract. It is difficult to understand why the premium on such bond is not a part of the cost of the contract. It had to be given and approved before the contract could take effect; it was a cost which the contractor was called upon to incur; it was a cost moreover which the contract itself provided for; it can not be said that it is separate and distinct from the contract, and not a part of it. It was a bond which was required by statute, and before being accepted had to be approved by the contracting officer. 33 Stat. 811; 28 Stat. 279. Army Regulations Par. 569.

The bond in this case was required and approved by the contracting officer; the premium on the bond was paid by the United States to the plaintiff in accordance with paragraph h, Article II, of the contract. More than two years after this payment was made to the plaintiff it was deducted from money otherwise due the plaintiff. In view of what has been said, and in view of the fact that the United States entered into negotiations with the various surety companies for the purpose of having them reduce their premiums on such bonds before this or any similar contracts were executed, thus showing their purpose and intention to pay the cost of such bonds, the court is of opinion that the premium on this bond is properly payable by the United States under the terms of the contract.

The next item of the claim is the amount of premiums of insurance paid by the plaintiff. These premiums were paid by the plaintiff,

and such payment was approved by the contracting officer, and
26 having been so approved under Article II of the contract the payment must be allowed.

A judgment in the sum of $12,064.52 will be entered for the plaintiff. It is so ordered.

Graham, judge; Downey, judge; and Booth, judge, concur.

Campbell, Chief Justice, dissents:

I dissent from the judgment as to the two items involving cost of contractor's and subcontractor's bonds.

27 *VII. Defendants' application for and the allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 18th day of April, 1921, in favor of the claimant, the defendants, by their Attorney General, on the 28th day of June, 1921, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed June 28, 1921.

Ordered: That the above appeal be allowed as prayed for.

EDW. K. CAMPBELL,
Chief Justice.

June 30, 1921.

Court of Claims.

NORTH-EASTERN CONSTRUCTION CO.
vs.
UNITED STATES. } No. 34229.

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the court in the case of Mason & Hanger, No. 34208, referred to; of the judgment of the court; of the defendants' application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this fifth day of July, A. D. 1921.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 28366. Court of Claims. Term No. 411. The United States, appellant, *vs.* North-Eastern Construction Company. Filed July 13th, 1921. File No. 28366.